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No. 91-367

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CAROL ANKENBRANDT,

Petitioner,

—v.—

JON A. RICHARDS and
DEBRA KESLER,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the protection of individual rights and to the availability of the federal courts for the vindication of those rights.

The jurisdictional issues presented by this case are of particular concern to the ACLU's Children's Rights Project, which has litigated numerous statutory and constitutional claims on behalf of children in federal courts throughout the country.

STATEMENT OF THE CASE

Petitioner Carol Ankenbrandt brought this tort action against her former husband and his female companion on behalf of her two minor daughters in the District Court for the Eastern District of Louisiana in September 1989 seeking money damages for the alleged sexual abuse of her children. Pet.Cert. at 1. Ankenbrandt is a Missouri citizen; respondents Jon A. Richards, the children's father, and Debra Kesler, are citizens of Louisiana. The complaint was brought under the diversity jurisdiction of the district court.

In August 1989, a month before the tort suit was initiated, the Jefferson Parish, Louisiana, Juvenile Court entered a judgment pursuant to state law terminating all of Richards' parental rights on the grounds of abuse and permanently enjoining him from any contact with the children. *Id.* Richards did not defend himself against the allegations in the juvenile court proceedings and did not appeal the decision. The time for any appeal has

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

now run.[2]

On December 10, 1990, the district court granted defendants' motion to dismiss, citing a domestic relations exception to federal court jurisdiction and the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). *Ankenbrandt v. Richards*, No. 89-4244, 1990 U.S. Dist. LEXIS 17068 (E.D. La Dec. 10, 1990). The Fifth Circuit affirmed without opinion. 934 F.2d 1262 (5th Cir. 1991). This Court granted Ankenbrandt's petition for *certiorari* on January 10, 1992, limited to the following questions:

1) Is there a domestic relations exception to federal jurisdiction?

2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages?

3) Did the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971)?

SUMMARY OF ARGUMENT

This case raises important issues about the scope of federal jurisdiction and the authority of federal courts to create expansive exceptions to the statutory jurisdiction that Congress has conferred. We are mindful, of course, of the controversy that has swirled around diversity jurisdiction. Nevertheless, we believe that any alterations in that jurisdiction must be made by Congress and not by judicial reinterpretation of a domestic relations exception

[2] Richards has since claimed that, on the advice of counsel, he chose neither to defend himself against the allegations of abuse in the divorce and juvenile proceedings, nor to appeal the termination of his parental rights, because he was told that to do so would have prejudiced his defense against then-pending felony charges. Apparently those criminal charges were later dropped. Op.Cert. at 10-11.

that has never rested on a firm doctrinal foundation.

Given our limited role as *amicus curiae*, this brief does not address whether a domestic relations exception should ever be recognized in federal diversity cases, other than to note that the historical argument in favor of such an exception has been widely criticized. Assuming that such an exception exists, it was error to apply it to the facts of this case.

The commonly offered rationale for a domestic relations exception is that federal courts should refrain from adjudicating "core" or "primary" issues of state domestic relations law for reasons of both competence and comity. At the same time, the federal courts have always been cognizant of their obligation to exercise the jurisdiction that Congress has authorized. Even those who favor a domestic relations exception have therefore limited it to such issues as: the granting of divorces and separations; the allowance of alimony and child support; and the determination of paternity, parental fitness, child custody and visitation. Conversely, the rationale for a domestic relations exception also defines its limits. Thus, generally speaking, a domestic relations exception has not been applied to contract or tort cases that do not involve the application of substantive state domestic relations law, even though those cases may have intrafamily aspects.

That is precisely the situation in this case. Resolution of petitioner's claim does not require adjudication of petitioner's marital or custody status, child support, visitation or alimony. Instead, this is a simple tort action between parties that were, at one time, members of the same family. Such cases do not fit within the domestic relations exception as it has been traditionally understood, and cannot be brought within an expanded definition of the domestic relations exception without seriously interfering with Congress' right to determine federal jurisdiction.

The mere fact that some of the real parties in interest are children and that the asserted tort was committed against them by their one-time custodian does not justify application of the domestic relations exception. Federal courts have repeatedly and appropriately addressed a broad range of issues brought by children when those suits have been against government custodians and have invoked federal question jurisdiction.

Finally, the courts below erred in abstaining from jurisdiction under *Younger v. Harris*, 401 U.S. 37. *Younger* permits abstention only if there are ongoing state court proceedings at the time the federal litigation is commenced. Here, all juvenile court proceedings involving the parties had concluded when petitioner filed suit in federal court and there were no other pending state court proceedings.

ARGUMENT

I. ANY DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION DOES NOT APPLY TO THIS TRADITIONAL TORT CLAIM, WHICH IS BROUGHT SOLELY TO RECOVER MONEY DAMAGES FOR PAST INJURIES AND WHICH DOES NOT SEEK TO ALTER ANY PARTY'S MARITAL, PARENTAL OR CUSTODY STATUS

Assuming, *arguendo*, that there is a domestic relations exception to federal diversity jurisdiction,[3] neither

[3] As noted in the Statement of the Case, the Court granted *certiorari* on a threshold question of whether a domestic relations exception to federal jurisdiction exists. There is, in fact, substantial reason to question the authority of the historical underpinning to the domestic relations exception. *See generally Spindel v. Spindel*, 283 F.Supp. 797 (E.D.N.Y. 1968). However, for purposes of this brief, *amicus* assumes (continued...)

its historic rationale nor its contemporary purposes support the district court's decision to apply the exception to this simple tort action. In fact, the trial court's expansive application of the domestic relations exception represents a significant and unwarranted departure from a long line of federal decisions that have narrowly construed the exception to apply only to "core" domestic relations issues.

A. The Historical Rationale For The Domestic Relations Exception Does Not Support Its Application In This Case

The domestic relations exception to federal diversity jurisdiction is judge-made law, originating in *dictum* in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). In that case the Court determined that a wife could properly invoke the diversity jurisdiction of a federal court to enforce a state decree granting her a separation and alimony. Although unnecessary to its decision, the *Barber* Court prefaced its discussion of the case by "disclaim[ing] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . . ." *Id.* at 584. No authority was cited.

The reasoning behind this disclaimer was that divorce, child custody and related matters had historically been the exclusive province of the ecclesiastical courts in England rather than the Chancery. This jurisdictional preclusion, in turn, purportedly bound the common law and equity courts of the United States, whose jurisdiction devolves from the Chancery. *See generally* 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3609, at p.460 (1984). The criticism of this historical explanation is widespread. *See, e.g., Lloyd v.*

[3] (...continued)
the existence of the exception and limits discussion to its proper scope.

Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982)(Posner, J.); *Solomon v. Solomon*, 516 F.2d 1018, 1027 (3d Cir. 1975) (Gibbons, J., dissenting); *Spindel v. Spindel*, 283 F.Supp. at 802-03, 806-90 (Weinstein, J.). At best, however, the historical rationale for a domestic relations exception is limited to the power to grant divorces, award child custody, and allow alimony; it provides no support for the district court's refusal in this case to assert jurisdiction over a common law tort claim.

B. None Of The Modern Reasons Commonly Cited In Support Of A Domestic Relations Exception Apply To This Tort Action

Despite its dubious historical underpinnings, the existence of a domestic relations exception to federal diversity jurisdiction has been broadly accepted by the lower federal courts. *See Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir. 1988); *Lloyd v. Loeffler*, 694 F.2d at 492. As justification for this unwritten exception to the statutory provision for diversity jurisdiction, 28 U.S.C. §1332, those lower courts that offer any explanation most often point to "'the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts.'" *Jagiella v. Jagiella*, 647 F.2d 561, 564 (5th Cir. 1981)(citation omitted). *Accord Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 22 (1st Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 244 (1991); *Lloyd*, 694 F.2d at 492-93.

Reflecting these policy interests, the domestic relations exception has traditionally been limited to disputes involving so-called "core" or "primary" issues of domestic relations law. *See, e.g., Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983). These include the granting of divorces and separations, the allowance of alimony and child support, and the determination of paternity, parental fitness, child custody or visitation rights. *See, e.g., Fernos-Lopez*, 929 F.2d at 22; *Ingram v. Hayes*, 866 F.2d 368, 369 (11th Cir. 1988); *Drewes*, 863 F.2d at 471-72; *Kirby v. Mellenger*, 830 F.2d 176, 177-78 (11th Cir. 1987); *Hooks v. Hooks*, 771 F.2d 935, 942 (6th Cir. 1985); *Cole v. Cole*, 633 F.2d 1083, 1088 (4th Cir. 1980); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978). Significantly, each of these core domestic relations issues necessarily involves the application of substantive state domestic relations law in order either to determine financial support or to adjust the status of individual family members.[4]

When these core issues of state domestic relations law are not present, or not critical to the resolution of the dispute between the parties, federal courts have consistently and appropriately exercised the jurisdiction that Congress has conferred. Furthermore, a long line of federal cases holds that the domestic relations exception to federal diversity jurisdiction must be narrowly construed. *See, e.g., Rykers v. Alford*, 832 F.2d 895, 900 (5th Cir. 1987); *Kirby*, 830 F.2d at 178; *Peterson*, 708 F.2d at 466; *Phillips, Nizer v. Rosenstiel*, 490 F.2d 509, 514 (2d Cir. 1973). The fact that the exercise of federal diversity jurisdiction may incidentally have an impact on subject matter that is also cognizable in state court does not permit (much less require) a "district court . . . [to] simply avoid all diversity cases having intrafamily aspects." *Cole*, 633 F.2d at 1088. Thus, federal courts routinely and properly hear cases "whose essence is in, for example, tort or contract, and which do not require the feder-

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[4] There is disagreement among the lower courts as to whether a refusal to adjudicate core domestic relations cases represents an exercise of the court's discretionary power over its jurisdiction or whether the federal courts simply lack diversity jurisdiction over such cases. *See Jagiella*, 647 F.2d at 564 n.11. The majority of courts that have considered this question, including the Fifth Circuit, have deemed application of the domestic relations exception to be an exercise of discretion. *Id.*

al court to exceed its competence . . . ." *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C.Cir. 1982).[5]

Judged by that standard, the lower courts in this case erred in refusing to exercise federal jurisdiction. Indeed, petitioner's tort claim is exactly the type of claim over which "[t]he federal courts may not refuse jurisdiction merely because the parties were at one time in a marital relationship and the motive for the tort may spring from that source." *Drewes*, 863 F.2d at 471-72. Petitioner seeks to recover money damages on behalf of her children for past injury -- in this case the alleged sexual abuse of the children. She is not requesting declaratory or injunctive relief modifying any of the core aspects of domestic relations law, such as marital or custody status, child support, visitation or alimony.[6] Her tort claim,

[5] *See, e.g., Drewes*, 863 F.2d at 471-72 (federal court has jurisdiction over intentional infliction of emotional distress and interference with employment claims arising out of mother's concealment of child and prevention of father from exercising visitation rights); *McIntyre v. McIntyre*, 771 F.2d 1316, 1318 (9th Cir. 1985)(domestic relations exception does not apply to father's claim against former wife for intentional tortious interference with visitation rights)(per Kennedy, J.); *Wasserman v. Wasserman*, 671 F.2d 832, 834-35 (4th Cir.), *cert. denied*, 459 U.S. 1014 (1982)(federal court is competent to decide torts of child enticement and intentional infliction of emotional distress where custody of child is not in dispute); *Cole*, 633 F.2d at 1088-89 (domestic relations exception does not bar former husband's claims against former wife for malicious prosecution, abuse of process, arson and conversion); *Crouch*, 566 F.2d at 487-88 (court has jurisdiction to enforce voluntary separation agreement).

[6] This distinguishes petitioner's claim from several others cited by the trial court in support of its decision below. For example, in *Rogers v. Janzen*, 891 F.2d 95 (5th Cir. 1989), the Fifth Circuit applied the domestic relations exception to a case in which a mother, who was the noncustodial parent, sued her former husband for emotional distress caused by his alleged sexual abuse of their daughter. Unlike petitioner in the instant case, the plaintiff in *Rogers* was arguably attempting to relitigate a custody and visitation case under the guise of bringing a tort action.

therefore, does not require any inquiry into the "best interests" of the children or into other aspects of substantive domestic relations law where federal courts traditionally defer to the special concern and competence of the state. Moreover, the tort in question, sexual abuse, is one which the federal courts are "entirely competent, in this case as much as any other, to determine traditional tort issues such as the existence of a legal duty, the breach of that duty, and the damages flowing from that breach." *Bennett*, 682 F.2d at 1042.[7]

In dismissing the action below, the district court opined that resolution of Ankenbrandt's tort suit would require an inquiry into the parent-child relationship, compelling the federal court to "revisit" evidence considered in the juvenile court proceedings that resulted in the termination of Richards' parental rights. The trial court concluded that such an inquiry would cause it to become "overly involved in the state court's determination of both the abuse and the fitness of Richards as a

[7] The fact that children are real parties in interest in this case, and that the asserted tort was committed against them, does not in any way bring this case under the domestic relations exception. To the contrary, the federal courts are entirely competent and have readily addressed a large range of issues when children have brought suit against their government custodians under federal question jurisdiction seeking both individual and systemic relief. *See, e.g., Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983) (due process rights of child sexually abused by government-funded foster parent); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989)(due process rights of child physically abused by government-funded foster parents); *Parham v. J.R.*, 431 U.S. 936 (1977)(noting federal jurisdiction over a case involving due process rights of children committed to mental hospitals); *Wilder v. Bernstein*, 645 F.Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988)(equal protection and First Amendment rights of children in government-funded foster care system); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977)(due process rights of children being removed from government-funded foster homes).

parent" and that application of the domestic relations exception was warranted. *Ankenbrandt v. Richards*, 1990 U.S. Dist. LEXIS 17068, at *2.

There is no support for such a concern. The standard for determining the fitness of Richards as a parent is a state law question that was determined in state court in Louisiana and is not an issue in this case. By contrast, the standard for determining whether abuse has taken place is a the sort of traditional tort inquiry that federal courts can and do routinely resolve. *See, e.g., Doe v. New York City Dep't of Social Services*, 649 F.2d 134; *Taylor v. Ledbetter*, 818 F.2d 791.

The expansive interpretation of the domestic relations exception embraced below stems from a misunderstanding of the meaning of widely-quoted *dicta* in *In re Burrus*, 136 U.S. 586, 593-94 (1890). *See Ankenbrandt*, 1990 U.S. Dist. LEXIS 17068 (claiming that federal courts for a century have recognized the state interest set forth in *Burrus* as the foundation for a domestic relations exception). In *Burrus*, the Court observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." This broad disclaimer, however, refers not to the competence of the federal judiciary to hear domestic relations cases, but to the fact that the law governing intrafamily disputes is state law. *See Spindel*, 283 F.Supp. 797.

In sum, neither the language in *Burrus* nor the narrowly construed domestic relations exception as it has evolved support the decision below.

II. *YOUNGER* ABSTENTION DOES NOT APPLY BECAUSE THERE IS NO PENDING STATE COURT PROCEEDING

This Court has held that abstention from the exercise of federal jurisdiction is an "extraordinary and narrow exception to the duty of a district court to adjudicate

a controversy properly before it." *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813 (1976)(citation omitted). As then-Judge Anthony Kennedy observed in the context of another tort case implicating domestic relations issues, "[a]bsent 'an important countervailing interest,' federal courts have 'the virtually unflagging obligation' . . . to exercise the jurisdiction given them." *McIntyre*, 771 F.2d at 1319.[8]

In this case, there are no "important countervailing interest[s]" and the district court clearly erred in holding that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37. *Younger* abstention is appropriate only if 1) there are ongoing state proceedings of a judicial nature at the time the federal litigation is commenced; 2) the state proceedings implicate an important state interest; and 3) the state proceedings afford an adequate opportunity to raise federal claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).[9]

On this record, the Court need look no further than the threshold issue of whether there was any pending state proceeding at the time petitioner filed her federal complaint. There was none. The proceedings in the juvenile court terminating Richards' parental rights had been concluded and no other active case was or is pend-

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[8] In *McIntyre*, the Ninth Circuit ruled that neither the domestic relations exception to diversity jurisdiction nor the abstention doctrine apply to a case brought by a former husband against his ex-wife seeking money damages for the alleged breach of visitation rights.

[9] Even when these conditions are met, *Younger* abstention is inappropriate if the state proceedings are motivated by a desire to harass the federal plaintiff, are conducted in bad faith, or if extraordinary circumstances otherwise exist. *Huffman v. Pursue*, 420 U.S. 592, 611 (1975).

ing.[10] The fact that the juvenile court retains continuing jurisdiction over custody and visitation issues is not sufficient reason for the federal court to abstain from hearing a tort case properly before it. *Norman v. Johnson*, 739 F.Supp. 1182, 1189-90 (N.D.Ill. 1990). *Accord K.H. v. Morgan*, No. 87-C-98-33, 1989 U.S. Dist. LEXIS 10516 (N.D.Ill., Sept. 6, 1989)(mere fact of continuing jurisdiction by juvenile court over plaintiff's affairs does not require abstention), *aff'd in part, remanded in part*, 914 F.2d 846 (7th Cir. 1990). Moreover, even a pending juvenile court proceeding would not warrant abstention in these circumstances since the juvenile court has no jurisdiction over petitioner's tort claim. *Cf. Deakins v. Monaghan*, 484 U.S. 193, 202 (1988)(district court has no discretion to dismiss claims for monetary relief that cannot be redressed in the state proceeding).

"[T]he relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." *Huffman*, 420 U.S. at 602-03. Here, there is neither a pending state proceeding nor a contemplated state proceeding in which petitioner could obtain relief for her tort claims. Accordingly, there was no legal basis for denying petitioner the right to sue in federal court.[11]

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[10] The mere availability of a state forum for petitioner's tort claims does not mandate federal abstention. *See Monaghan v. Deakins*, 798 F.2d 632, 638 (3d Cir. 1986), *aff'd in part, vacated in part as moot*, 484 U.S. 193 (1988); *see also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Thus, the mere fact that a state court proceeding may be filed in the future, a possibility that has been raised by respondents in their brief in opposition to *certiorari*, is not sufficient to invoke *Younger*.

[11] *Moore v. Sims*, 442 U.S. 415 (1979), which applied *Younger* abstention to enjoin a pending state child custody proceedings, is not to the contrary. In *Moore*, unlike the instant case, the state proceedings were ongoing when the federal complaint was filed. In addition, the plaintiff in *Moore*, unlike Ankenbrandt, was requesting a federal injunction of the state proceedings.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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Dated: February 11, 1992